

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CHARLES PHILLIP CLARK,

Defendant-Appellant.

UNPUBLISHED
February 22, 2005

No. 251351
Calhoun Circuit Court
LC No. 2003-000571-FC

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), assault with intent to do great bodily harm less than murder, MCL 750.84, and armed robbery, MCL 750.529. He was sentenced as a third-felony habitual offender, MCL 769.11, to concurrent prison terms of twenty to forty years for the armed robbery conviction and 9-1/2 to 40 years for the assault conviction, and a consecutive term of twenty to forty years for the home invasion conviction.¹ He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that there was insufficient evidence to sustain his home invasion and armed robbery convictions. In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

We reject defendant's claim that there was insufficient evidence of a breaking and entering. The complainant testified that he locked all of his doors before he went to bed. While he was sleeping, he was awakened by a loud crashing noise and then observed defendant and another man in his living room. Evidence also indicated that there was visible damage to the doors of the complainant's house. Viewed most favorably to the prosecution, the evidence

¹ MCL 750.1102(8).

supported an inference that defendant entered the complainant's house after forcibly opening and damaging the complainant's door.

We also reject defendant's claim that there was insufficient evidence to establish that defendant was armed. To constitute armed robbery, the robber must be armed either with an article that is a dangerous weapon, or an article that, although harmless in itself, is used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon. *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983). Whether an object is a dangerous weapon depends upon the object itself and how it is used, and whether an object is a dangerous weapon under the circumstances of a case is a question of fact. *People v Norris*, 236 Mich App 411, 414-415; 600 NW2d 658 (1999).

In this case, the complainant testified that defendant used some type of cord to choke him, and threatened to kill him while doing so. Viewed in a light most favorable to the prosecution, this testimony was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant used the cord in a manner to induce a reasonable belief that it was a dangerous weapon. Accordingly, there was sufficient evidence for the jury to find that defendant was armed within the meaning of MCL 750.529.

Defendant also requests resentencing, claiming that the trial court improperly enhanced his sentence on the basis of prior counselless convictions. He points out that his presentence investigation report (PSIR) indicates that it was unknown whether he was represented by counsel for several of his prior convictions. Defendant failed to preserve this issue by challenging his prior convictions at or before sentencing. Therefore, we review this issue for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003).

For collateral challenges such as this, defendant bears the initial burden of establishing that a prior conviction was obtained without counsel or a proper waiver of counsel. *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994). A defendant may meet this burden by (1) presenting prima facie proof that his previous conviction was counselless, such as a docket entry showing the absence of counsel or a transcript evidencing the same or (2) presenting evidence that the defendant requested such records from the sentencing court and that the court either (a) failed to reply to the request, or (b) refused to furnish copies of the records, within a reasonable time. *Id.*

A review of the record establishes that defendant has not met his initial burden. The fact that the PSIR shows five prior felony convictions and forty-seven misdemeanor convictions and indicates that it was unknown whether defendant was represented by counsel is not sufficient to establish a prima facie case that his convictions were indeed procured without the assistance of counsel. See *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996). Accordingly, defendant has not shown that the trial court's consideration of these disputed prior convictions constituted plain error.

Defendant has also failed to sustain his claim of ineffective assistance of counsel in connection with this issue. To demonstrate ineffective assistance, defendant must show that his attorney's performance fell below an objective standard of reasonableness and resulting prejudice. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). Because defendant

failed to request an evidentiary hearing concerning this claim, our review is limited to errors apparent on the record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993).

Although defendant claims that counsel should have raised the issue of his prior counselless convictions, the record does not show that any of defendant's prior convictions were obtained in violation of his right to counsel. Nor does it reveal whether counsel investigated the possibility that his prior convictions were counselless. Thus, defendant's claim of ineffective assistance of counsel on this basis necessarily fails.

Defendant further maintains that counsel should have pointed out that the dates listed in the PSIR for one of defendant's prior convictions reflected that defendant was convicted of the offense before the date of its occurrence. But because defendant does not dispute the existence of the prior conviction, and because there is no reasonable probability that defendant was prejudiced by any error relative to the listed dates, defendant's ineffective assistance of counsel claim necessarily fails.

Defendant also contends that counsel should have pointed out that his prior criminal record consisted of several out-of-state convictions, which defendant claims were not valid. The record does not indicate that these convictions were invalid, or the extent of counsel's investigation, and, therefore, this claim also fails.

Defendant contends that counsel should have investigated whether defendant was at some point actually enrolled at the "CAP" center, as indicated in the PSIR. Because the record does not show that counsel failed to fully investigate, and there is no apparent prejudice, defendant has not sustained his claim of ineffective assistance of counsel.

Finally, defendant has filed a supplemental brief pursuant to Administrative Order No. 2004-29 (Standard 4) replacing Administrative Order No. 1981-7 (Standard 11). Defendant raises various additional issues in his late-filed brief. We have considered defendant's arguments and find them without merit.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio